RATIONALIZING JURISDICTION

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There is a Jewish fable of a rabbi being called upon to mediate a dispute between two men. After listening to the first man tell his side of the story, the rabbi responded, "You're right." The other disputant then explained his position and the rabbi said, "You're right." An observer then said, "But rabbi, you told each of them that he was right." The rabbi thought for a moment and replied, "You're right, too."

This story came to mind as I read the heated exchange between Professors Freer and Arthur,[1] as critics of the 1990 Judicial Improvements Act, and Professors Rowe, Burbank, and Mengler, as defenders of the new law.[2] Professors Freer and Arthur rightly criticize the procedural problems with the last minute adoption of the Act and correctly identify ambiguities in the law with regard to supplemental jurisdiction.[3] On the other hand, Professors Rowe, Burbank, and Mengler correctly argue that the new law is very desirable in allowing pendent party jurisdiction and in reversing the Supreme Court's decision in *Finley v. United States*.[4]

Although I think that Professors Freer and Arthur properly identify several areas where the law should be clarified, I find it hard to agree

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[1] For the sake of simplicity, I will refer to the three articles criticizing the Act as the position of Professors Freer and Arthur even though the first was authored by Professor Freer alone. *See* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Burnt Straws*]; Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991).

[2] Professors Rowe, Burbank, and Mengler have written three articles about the 1990 Act, two in response to Professors Freer and Arthur. *See* Thomas M. Mengler, Stephen B. Burbank & Thomas D. Rowe, Jr., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991); Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe, Burbank & Mengler, *A Reply*]; Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991) [hereinafter Rowe, Burbank & Mengler, *A Coda*].

[3] *See* Arthur & Freer, *Burnt Straws*, *supra* note 1, at 964.

[4] 490 U.S. 545 (1989). *See* Rowe, Burbank & Mengler, *A Coda*, *supra* note 2, at 994.

with their overall conclusion that the statute is a "disaster" and should be repealed.[5] In fact, after having read the articles on both sides of this fascinating debate, I was left wondering how many cases actually would be adversely affected by the new law. For example, a major criticism of the statute is that it does not allow pendent party jurisdiction in alienage cases.[6] Professors Freer and Arthur estimate that eight percent of diversity cases are based on alienage jurisdiction. Because diversity cases are less than twenty-five percent of the federal courts' civil caseload,[7] fewer than two percent of federal court cases are founded on alienage jurisdiction. The number of these involving pendent party claims likely is quite small, meaning that Freer and Arthur's criticism of the statute, as it applies to alienage jurisdiction, though correct, will apply to only a few cases a year.

In other instances, changes that Freer and Arthur criticize might actually be beneficial revisions in the law. For example, they note that the 1990 law might have the effect of overruling the Supreme Court's decision in *Zahn v. International Paper Co.*,[8] which held that each plaintiff in a federal class action based on diversity jurisdiction must independently satisfy the amount in controversy requirement.[9] But this impact should be applauded because class actions are particularly important when many people suffer relatively small harms that are too insignificant to justify individual suits.[10]

My goal in this Essay is not to appraise each point in the Freer/Arthur v. Rowe/Burbank/Mengler debate. Nor do I seek to analyze the statutory provisions in detail; the primary authors provide a superb critique and defense of the law and I have little to add. Instead, my focus is on a more general question: Why did the problems in the 1990 law occur? Certainly, some of the difficulties are the result of the midnight revisions and passage

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[5] The subtitle of Arthur and Freer's first reply to Rowe, Burbank, and Mengler is "The Disaster of the Supplemental Jurisdiction Statute." In that article, they call for the overruling of the Act. Arthur & Freer, *Burnt Straws*, *supra* note 1, at 989.

[6] Freer, *supra* note 1, at 474-75.

[7] 1986 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 12, Table 5. This statistic preceded the increase in the amount in controversy requirement from in excess of $10,000 to in excess of $50,000.

[8] 414 U.S. 291 (1974).

[9] *Id.* at 301.

[10] For criticisms of *Zahn*, see Brian Mattis & James S. Mitchell, *The Trouble with* Zahn*: Progeny of* Snyder v. Harris *Further Cripples Class Actions*, 53 NEB. L. REV. 137 (1974); William H. Theis, Zahn v. International Paper Co.*: The Non-aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89 (1974).

of the Act,[11] and some might be the result of unintended oversights or even a bit of sloppy drafting. However, I contend that, to a large extent, the problems stem from deeper sources in the law of federal jurisdiction.

First, the law of diversity jurisdiction is filled with irrational and logically indefensible rules. Any law built upon this foundation — as the 1990 Act is — will in some ways seem arbitrary and be open to criticism.

Second, the Supreme Court's desire to narrow the scope of federal question jurisdiction led to its decision in *Finley* and the need for the 1990 Act. If the Court had taken a more sensible approach and allowed pendent party jurisdiction, the 1990 Act and all of its problems could have been avoided.

Third, the Supreme Court never has articulated a coherent theory for the concepts of pendent and ancillary jurisdiction. They were once properly labeled "the child[ren] of necessity and the sire of confusion."[12] Without a consistent, sensible theory to explain supplemental jurisdiction, any statutory codification surely had to contain anomalies and ambiguities.

My overall conclusion is that the 1990 codification of supplemental jurisdiction was a desirable, though somewhat flawed, improvement in the law. Clarification through statutory amendments or judicial interpretation would be desirable. Ultimately, however, the real problems lie much deeper in the law of federal jurisdiction.

I. THE UNSATISFYING LAW OF DIVERSITY JURISDICTION

Much of Freer and Arthur's criticism of the 1990 Act concerns its treatment of diversity jurisdiction. I suggest that any statute building on the existing law of diversity jurisdiction was bound to be unsatisfying. The law in this area is a mess as a result of long-standing rules that make little sense. The 1990 Act tried to leave this law intact, but in doing so became vulnerable to attack for codifying some of the unsatisfying aspects of diversity jurisdiction.

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[11] For an excellent account of the adoption of the new law, see John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvement Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991).

[12] George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 45 (1963).

For example, a good deal of the Freer/Arthur and Rowe/Burbank/Mengler exchange concerns the desirability of the 1990 Act's preservation of *Owen Equipment & Erection Co. v. Kroger*,[13] which held that federal courts may not hear claims by a plaintiff against a non-diverse third-party defendant.[14] Freer and Arthur argue that this is an undesirable decision reflecting a bias against diversity jurisdiction.[15] Rowe, Burbank, and Mengler argue, in part, that the 1990 codification of supplemental jurisdiction was intended to overturn *Finley* and not to change other aspects of the law, including the *Owen* rule.[16]

My position is that *Owen* makes sense only if the rule requiring complete diversity is desirable. Complete diversity requires that no plaintiff in a diversity case be from the same state as any defendant. The Supreme Court in *Owen* explicitly explained that the justification for its holding was to prevent plaintiffs from circumventing the requirement for complete diversity. The Court stated:

> But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same state in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. 1332 only when there is complete diversity of citizenship. . . . To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.[17]

The Court feared that a plaintiff wanting to sue two defendants, one diverse and one not diverse, would sue only the former with the hope that the non-diverse defendant would then be impleaded. The plaintiff then could circumvent the requirement for complete diversity by asserting a claim against the non-diverse third-party defendant.

If the complete diversity rule is desirable, *Owen* is quite defensible and its statutory codification is to be applauded. The problem is that the complete diversity rule makes little sense. The Supreme Court created it in

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[13] 437 U.S. 365 (1978).
[14] *Id.* at 376-77.
[15] Freer, *supra* note 1, at 475-76.
[16] Rowe, Burbank, & Mengler, *A Reply*, *supra* note 2, at 949.
[17] *Owen*, 437 U.S. at 377.

Strawbridge v. Curtis[18] as an interpretation of the diversity jurisdiction statute. Yet, nothing in the statute, then or now, requires complete diversity. In fact, Chief Justice John Marshall is said to have later regretted creating the rule.[19]

The requirement for complete diversity has many pernicious effects. A plaintiff desiring a federal forum may omit parties from his or her state and sue them separately in a state court proceeding.[20] The result is concurrent litigation involving the same subject matter in two different courts. Conversely, a plaintiff trying to avoid removal to federal court might add defendants who are from the same state.

This is not the only area where the law of diversity jurisdiction makes little sense. For instance, diversity jurisdiction does not exist if there is a party who is a citizen of the United States but not a citizen of a specific state.[21] But this rule seems unjustified in light of the underlying purposes of diversity jurisdiction. A person who is not a citizen of any particular state is just as likely as a citizen of another state to be a victim of a court's prejudice against out-of-staters. Indeed, a court might be reluctant to discriminate against citizens of other states for fear that their state courts might retaliate, but individuals who are not citizens of any state seem to be more vulnerable to potential discrimination.[22]

Why has the law remained filled with these undesirable rules? I believe that the answer is largely political. The very existence of diversity jurisdiction is controversial and there long have been proposals to eliminate it. Those who favor retaining diversity jurisdiction see little chance of expanding its scope by abolishing the complete diversity rule or other anomalies in the law. Those who seek to abolish diversity jurisdiction have no desire to expand it; in fact, the incongruities in the law help them to make a case for eliminating it.

In adopting the 1990 codification of supplemental jurisdiction, Congress did not want to face the controversial question of whether to eliminate

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[18] 7 U.S. (3 Cranch) 267 (1806).

[19] *See* Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).

[20] Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 967-68 (1979).

[21] *See, e.g.*, Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980).

[22] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 248 (1989).

diversity jurisdiction. Nor was it about to change the requirement for complete diversity and thereby substantially increase the scope and number of diversity jurisdiction cases. Therefore, Congress had no satisfactory way to deal with *Owen*. If Congress by statute overruled *Owen*, it undermined the rule of complete diversity. If Congress by statute preserved *Owen* — as it did — it was vulnerable to exactly the criticisms advanced by Professors Freer and Arthur.

In other words, the real problem in this area is not the specific provision of the 1990 law preserving the *Owen* rule as an exception to supplemental jurisdiction. The serious difficulty is in the underlying law of diversity jurisdiction and the political impasse which prevents either the elimination of diversity jurisdiction or its expansion.

II. The Court's Desire to Limit Federal Question Jurisdiction

The 1990 codification of supplemental jurisdiction was a direct response to the Supreme Court's decision in *Finley v. United States*.[23] I believe that *Finley* was an unfortunate decision and ultimately it is to blame for the problems with the 1990 legislation. If the Court had approved pendent party jurisdiction in *Finley*, there would not have been a need for the new statute. More troubling, I believe that *Finley* and the Court's 1986 ruling in *Merrell Dow Pharmaceuticals v. Thompson*[24] reflect an unjustified desire to narrow the scope of federal question jurisdiction. Simply put, the law of federal jurisdiction would be far more coherent and desirable if the Supreme Court began with the assumption that federal courts generally should be available to hear cases presenting important issues of federal law.

Finley was a five-to-four decision, with the Court divided along ideological lines. Justice Scalia wrote for a majority consisting of Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy. The opinion by Justice Scalia emphasized that earlier Court decisions — *Aldinger v. Howard*[25] and *Owen* — had already rejected the concept of pendent party jurisdiction. The Court distinguished pendent claim jurisdiction, which it

[23] 490 U.S. 545 (1989).
[24] 478 U.S. 804 (1986).
[25] 427 U.S. 1 (1976).

reaffirmed as permissible, from what it viewed as the "much more radical" concept of pendent party jurisdiction.[26]

But the distinction between pendent party jurisdiction and pendent claim jurisdiction is very questionable from the perspective of either Article III or § 1331.[27] Neither the Constitution nor federal statutes authorize either pendent claim or pendent party jurisdiction. Pendent claim jurisdiction is a judicial creation to serve the interests of enhancing efficiency and preserving the attractiveness of the federal forum. Requiring plaintiffs to split their litigation of a single set of facts between state and federal courts is wasteful and also makes the state court, where all matters could be litigated, a far more attractive forum for the litigation of federal claims.

But these considerations apply as equally to pendent party jurisdiction as they do to pendent claim jurisdiction. Requiring the same matter to be litigated against one party in federal court and another in state court is likely to be duplicative and wasteful. Assuming that the federal claim can be litigated in state court, the plaintiff has an incentive to bring both claims there.

Nor can the Court's result in *Finley* be justified as mere adherence to precedent. Neither *Aldinger* nor *Owen* resolved the overall question of pendent party jurisdiction. In *Aldinger*, the Supreme Court held only that local governments could not be sued via pendent party jurisdiction because of the desire to preserve the rule then in effect that prevented suits against cities under 42 U.S.C. § 1983.[28] In fact, the *Aldinger* Court expressly recognized that "[o]ther statutory grants and other alignments of parties and claims might call for a different result."[29] Furthermore, as discussed above,[30] *Owen* was limited to diversity suits and was based on a desire to preserve the rule of complete diversity. *Owen* did not, in any way, deal with the question of pendent party jurisdiction in federal question cases.

I do not believe that the ideological split on the Court in *Finley* was coincidental. Rather, it was a continuation of the trend which began dur-

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[26] *Finley*, 490 U.S. at 555.

[27] 28 U.S.C. § 1331 (Supp. 1989).

[28] *Aldinger*, 427 U.S. at 18. In 1978, the Court reversed itself and held that local governments could be sued under § 1983. *See* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[29] *Aldinger*, 427 U.S. at 18.

[30] *See supra* notes 13-17 and accompanying text.

ing the Burger Court era where conservative Justices seek to limit the scope of federal court jurisdiction through devices such as narrowing standing and limiting the scope of statutory grants of jurisdiction. For example, just a few years before *Finley*, in *Merrell Dow Pharmaceuticals v. Thompson*,[31] the Court — again splitting on ideological lines — narrowed federal question jurisdiction. The Court held that a state law cause of action does not present a federal question, even if federal law is an essential component of the plaintiff's case, unless the federal law itself creates a cause of action.[32]

The Court's meager approach to federal question jurisdiction is responsible for *Finley* and ultimately, therefore, is the cause of the 1990 law. A far better approach would be for the Court to interpret § 1331 to facilitate federal court review of federal law questions.[33] In this way, a coherent view of federal question jurisdiction would exist and decisions like *Finley* — and the resulting need for statutory tinkering — would be avoided.

III. THE UNCERTAIN STATUS OF PENDENT AND ANCILLARY JURISDICTION

A final source of the problems discussed by Professors Freer, Arthur, Rowe, Burbank, and Mengler stems from the Court's historic failure to offer a coherent theory to explain pendent and ancillary jurisdiction. Until 1990, pendent and ancillary jurisdiction were entirely judicial creations. The traditional, though often unarticulated, justification for pendent and ancillary jurisdiction is to interpret the word "case" to include all legal claims arising from a "common nucleus of operative fact."[34] The whole "case," all matters arising from the common nucleus of operative fact, arises under federal law. Thus, even state law claims may be considered when presented in this manner.

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[31] 478 U.S. 804 (1986).

[32] *Id.* at 817. For a discussion of *Merrell Dow*, see CHEMERINSKY, *supra* note 22, at 239.

[33] If this were followed, the well-pleaded complaint rule of Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908), would be very questionable. Although developing this criticism of *Mottley* is beyond the scope of this Essay, others have made a persuasive case for overturning *Mottley*. *See, e.g.*, Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987).

[34] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (articulating the test for pendent jurisdiction).

But the Supreme Court, at times, has rejected this explanation. In *Pennhurst State School v. Halderman*,[35] the Court concluded that pendent jurisdiction is just a "judge-made doctrine" and held that such a "judge-made doctrine"[36] cannot "be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment."[37] In *Pennhurst*, the Supreme Court held that the Eleventh Amendment barred federal courts from hearing pendent state law claims against state officers.[38]

But if pendent jurisdiction is just a "judge-made doctrine of expediency and efficiency"[39] it is unclear as to how it can continue to exist constitutionally. It is firmly established that federal courts can exercise no jurisdiction except that provided for in both Article III and a jurisdiction statute.[40] If pendent jurisdiction is "judge-made" and not inherent in the definition of a "case," then federal courts have given themselves a power contained in neither jurisdictional statutes nor the Constitution. In fact, if pendent jurisdiction is not implicit in Article III, then Congress could not authorize it, even in a statutory codification, because Article III imposes a ceiling on federal judicial power.[41]

The point is that the Supreme Court has never articulated a clear explanation for why pendent and ancillary jurisdiction are allowed under the Constitution and federal jurisdiction statutes. In fact, the Court's language in cases like *Pennhurst* calls the entire doctrine into question. I am not arguing that supplemental jurisdiction is unconstitutional. Rather, given the Court's failure to develop a coherent theory for pendent and ancillary jurisdiction, it is not surprising that a statutory codification

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[35] 465 U.S. 89 (1984).

[36] *Id.* at 117.

[37] *Id.* at 118.

[38] For a lengthier discussion of *Pennhurst*, see George D. Brown, *Beyond* Pennhurst — *Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); David Rudenstine, Pennhurst *and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71 (1984); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984).

[39] *Pennhurst*, 465 U.S. at 120.

[40] *See, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

[41] *See, e.g.*, National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (a majority of the Justices held that Congress may not allocate functions to Article III courts other than those enumerated in Article III).

would be plagued with some problems.

CONCLUSION

In adopting the 1990 codification of supplemental jurisdiction, Congress did much to clarify and improve the law. As Professors Freer and Arthur have ably demonstrated, the new law contains some ambiguities and uncertainties. As Professors Rowe, Burbank, and Mengler have shown, these problems do not negate all of the benefits of the new law.

My goal in contributing to this exchange has been to step back from the arguments about specific effects of the 1990 law and to suggest that the statute was written against a background almost guaranteed to create problems. Ultimately, developing a coherent law of federal jurisdiction will require addressing basic questions: Should diversity jurisdiction continue to exist; what is the appropriate scope of federal question jurisdiction; and upon what basis is supplemental jurisdiction constitutional? So long as the foundations of federal jurisdiction are filled with incoherence and uncertainty, all of the doctrines built upon those foundations will be plagued with difficulties.